IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 342 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RAHIM ALIAS SAMSUDDIN LALWANI

Versus

STATE OF GUJARAT

Appearance:

MR HRIDAY BUCH for Petitioner

MR HL JANI ADDL PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 13/06/2001

ORAL JUDGEMENT

#. Heard Mr.Hriday C.Buch, learned advocate appearing on behalf of the petitioner and Mr.H.L.Jani, learned APP for respondent - State.

#. Rule. Mr.H.L.Jani, learned APP waives service of

rule on behalf of the respondent - State.

#. According to the petitioner, FIR has been registered being C.R. No. I-6/2001 with Veraval City Police Station under Section 363, 366, 376, 377 of the IPC. In pursuance of the FIR registered against the present petitioner, immediately on 17th January, 2001, the petitioner was arrested by the concerned police authority. Thereafter the petitioner has preferred Regular Bail Application before the Additional Sessions Judge, Veraval being Criminal Misc. Application No.33/ 2001 but that application was dismissed by the Additional Sessions Judge vide order dated 14th February, 2001. The petitioner has challenged the said order of Additional Sessions Judge dated 14th February, 2001 before this Court by way of preferring regular Bail Application being Crim. Misc. Application No. 1802 / 2001 but that application has been withdrawn by the petitioner on 19th March, 2001. According to the petitioner, thereafter the investigating agency filed the chargesheet on or before 17th April, 2001 before expiry of the period of 90 days as prescribed under Clause 167(2)(a) of the CrPC. The petitioner preferred the application on 17th April, 2001 for releasing the petitioner on bail as prescribed under the said provisions. The said application has been dismissed by the JMFC, Veraval on 20th April, 2001 and thereafter that order dated 20th April, 2001 has been challenged by the petitioner before the Additional Sessions Judge, Veraval by filing Criminal Misc. Application No. 19/ 2001 and that application has also rejected on 30th April, 2001. Therefore, both these orders have been challenged by the present petitioner before this Court in the present proceedings.

#. Learned advocate Mr.H.C.Buch has submitted that there are certain undisputed facts and dates between the parties. The alleged offence has been committed by the present petitioner on 12th January, 2001 and FIR has been lodged against the present petitioner on 14th January, 2001 and in pursuance of the FIR, the petitioner was arrested by the concerned police authority on 17th January, 2001. Thereafter on 21st January, 2001, the police authority has asked for remand which was granted by the JMFC, Veraval for two days and thereafter the petitioner has submitted regular bail application on 17th April, 2001 and chargesheet has been submitted against the present petitioner on 18th April, 2001 at about 2.00 P.M.. In light of this undisputed facts between the parties, learned advocate Mr.Buch has submitted that 90 days period has expired on 16th April, 2001 and therefore the petitioner has indefeasible right to have regular

bail when the petitioner is prepared to furnish bail by filing necessary application before the concerned Court. But that application has been rejected by both the lower courts on the ground that before passing the order on the application submitted by the petitioner on 17th April, 2001, the concerned Police Authority has submitted the chargesheet on 18th April, 2001 and therefore, the observations made by the Additional Sessions Judge in respect of the proviso (a) to Section 167 (2) of Cr.P.C. as discussed in para-11 and 12 in the judgement dated 30th April, 2001, are as under :-

"11. Then, it further laid down that -

> "Summary of the latest position of law as laid down by the Supreme Court - (1) `Indefeasible right' is created in favour of the accused, if charge-sheet is not filed on expiry of the statutory period as provided in provision (a) to Section 167 (2) of Code; (2) No doubt, said right is `indefeasible right' but the life of that right is from the expiry of the period to file the chargesheet till the date the chargesheet is filed; and (3) that right dos not survive or remain enforceable on the chargesheet being filed and the application filed during default period is pending for disposal, same is required to be decided like a regular bail application, be it under Code or any other Act, if it provides for bail likewise."

12. Thus, from the principle of law laid down

> by our own High Court after referring the judgment of Apex Court which was relied by the advocate of accused and it is also relied before me by Mr.R.K.Buch, according to Hon'ble High Court, nodoubt, the right accrued under proviso (a) to Section 167 (2) is indefeasible right but the life of that right is from expiry of the period to file the chargesheet till the date of chargesheet is filed and that right does not survive or remain in force the day on which the chargesheet is filed and the day on which the chargesheet is filed, the default is cured and the right accrued in favour of the accused extinguished."

#. Learned advocate Mr.H.C.Buch has submitted that these observations made by both the lower courts are contrary to the law laid down by the Hon'ble Apex Court recently in the reported case in 2001 AIR SCW 1500 in case of UDAY MOHANLAL ACHARYA V. STATE OF MAHARASHTRA. Mr.H.C.Buch,

learned advocate has further submitted that in a case before the Apex Court was based on identical facts and in light of the similar type of set of facts, the Apex Court considered the relevant provisions of sub section (2) to Section 167 of the CrPC. Mr.Buch has relied upon the observations made by the Apex Court in Para-6 which is reproduced as under :-

"6. The expression 'if not already availed of used by this Court in Sanjay 6. The expression 'if not already availed of used by this Court in Sanjay Dutt's case (1994 AIR SCW 3857 : 1995 Cri LJ 477) (supra) must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in paragraph (a) of proviso to sub-section (2) of S.167 if the accused files an application for bail and offers also to furnish the bail, on being directed, then it has to be held that the accused has availed of his indefeasible right even though the Court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same.

With the aforesaid interpretation of the expression 'availed of' if charge-sheet is filed subsequent to the availing of the indefeasible right by the accused then that right would not stand frustrated or extinguished, necessarily therefore, if an accused entitled to be released on bail by application of the proviso to sub-section (2) of S.167, makes the application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then accused moves the higher forum and while the matter remains pending before the higher forum for consideration a charge-sheet is filed, the so-called indefeasible right of the accused would not stand extinguished thereby, and on the other hand, the accused has to be released on bail. Such an accused, who thus is entitled to be released on bail in enforcement of his indefeasible right will, however, have to be produced before the Magistrate on a charge-sheet being filed in accordance with S.209 and the Magistrate must deal with him in the matter of remand to custody subject to the provisions of the Code relating to bail and subject to the provisions of cancellation of bail, already granted in accordance with law laid down by this

Court in the case of Mohd.Iqbal v. State of Maharashtra (1996(1) SCC 722) (supra).

Having indicated the position of law, as above, and applying the same to the facts and circumstances of the present case, it appears that the prescribed period under paragraph (a) of the proviso to sub-section (2) of S.167 expired on 16-8-2000 and the accused filed an application for being released on bail and offered to furnish the bail on 17-8-2000. The Magistrate, however, erroneously refused the bail prayer on the ground that the proviso to sub-section (2) of S.167 has no application to case pertaining to MPID Act. The accused then moved the High Court. While the matter was pending before the Division Bench of the High Court, the learned Public Prosecutor took an adjournment and the case was posted to 31st August, 2000 and just the day before the charge-sheet was filed on 30th August, 2000 and thus the indefeasible right of the accused stood frustrated and the High Court refused to release the accused on bail on a conclusion that the accused can not be said to have availed of his indefeasible right, as held in Sanjay Dutt's case (1994 AIR SCW 3857 : 1995 Cri LJ 477) (supra) since, he has not yet been released on bail. But in view of our conclusion as to when an accused can be said to have availed of his right, in the case in hand, it has to be held that the accused availed of his right on 17th August, 2000 by filing an application for being released on bail and offering therein to furnish the bail in question. This being the position, the High Court was in error in refusing that right of the accused for being released on bail. We, therefore, direct that the accused should be released on bail on such terms and conditions to the satisfaction of the learned Magistrate, and further the Magistrate would be entitled to deal with the accused in accordance with law and observations made by us in this judgment, since the charge-sheet has already been filed."

#. Today, Mr.H.L.Jani, learned APP has filed affidavit-in-reply on behalf of the respondent - State, which is taken on record. Mr.H.L.Jani, learned APP has submitted that the chargesheet has been submitted by the concerned police authority in time, if two days remand has been excluded from the total arrest period. Therefore, he submitted that initial 24 hours are

required to be excluded in light of the relevant provisions of Section 167 (1) of Code and therefore, if two days remand period is excluded from the total period of 90 days, then, according to the learned APP Mr.Jani, chargesheet has been submitted by the concerned police authority well in time. I have considered the submissions made by the learned APP Mr.H.L. Jani with regard to relevant provisions of Section 167(1)(2) of the CrPC, wherein initial arrest is required to be authorised by the Magistrate according to the statute. Therefore, initial arrest has to be legalised if the concerned Magistrate is satisfied as to the arrest of the accused. Therefore, when the Magistrate is authorising the arrest or detention which does not amount to a fresh arrest or detention of the accused but it amounts to authorisation to the initial arrest meaning thereby initial arrest is authorised having effect from the date initial arrest. Therefore, total period of 90 days is required to be taken into account from the initial date of arrest or detention by concerned police authority in respect of FIR lodged against the accused. Therefore according to my bare perusal of the Section, two days period of remand cannot be excluded from the total period of arrest which requires completion of 90 days from the date of arrest and therefore, looking to the facts of the present case and observations made by the Apex Court in reported decision in case of UDAY MOHANLAL ACHARYA V. STATE OF MAHARASHTRA reported in 2001 AIR SCW 1500, where the Apex Court has on due consideration of Para (a) of proviso to sub - section (2) of Section 167 of CrPC, clearly observed that if the accused files an application for bail and offers also to furnish the bail, on being directed, then it has to be held that the accused has availed of his indefeasible right even though the court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same. With the aforesaid interpretation of the expression `availed of' if charge-sheet is filed subsequent to the availing of the indefeasible right by the accused then the right would not stand frustrated or extinguished, necessarily therefore, if an accused entitled to be released on bail by application of the proviso to sub-section (2) of Section 167, makes an application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then accused moves the higher forum and while the matter remains pending before the higher forum for consideration a chargesheet is filed, the so-called indefeasible right of the accused would not stand extinguished thereby, and on the other hand, the accused has to be released on bail. Such an accused, who

thus is entitled to be released on bail in enforcement of his indefeasible right will, however, have to be produced before the Magistrate on a chargesheet being filed in accordance with Section 209 and the Magistrate must deal with him in the mater of remand to custody subject to the provisions of the Code relating to bail and subject to the of cancellation of bail, already granted in accordance with law.

#. I have considered the submissions of both the learned advocates and after considering the relevant provisions of paragraph [a] of sub-section (2) of Section 167 of CrPC so also considering the observations made by the Apex Court in case of UDAY MOHANLAL ACHARYA, in my opinion, the orders passed by the learned JMFC, Veraval and the Additional Sessions Judge, Veraval dated 20th April, 2001 and 30th April, 2001 are erroneous and therefore, interference of this Court is warranted. In the result, the impugned orders passed by the JMFC, Veraval dated 20th April, 2001 and the order passed by the Additional Sessions Judge, Veraval dated 30th April, 2001 are hereby quashed and set aside and resultantly,, the petitioner is required to be enlarged on bail and therefore, he is ordered to be released on bail in connection with Crime Register No. I- 6 / 2001 registered at Veraval City Police Station for the offence charged against him in this application on executing bond of Rs.5,000/- (Rupees Five Thousand only) with one surety of the like amount to the satisfaction of the lower Court and subject to the conditions that he shall,

a) not take undue advantage of his liberty or abuse his liberty;

b) not to try to tamper or pressurize the prosecution witnesses or complainant in any manner;

c) maintain law and order and should co-operate the investigating officers;

d) not act in a manner injurious to the interest of the prosecution;

e) mark his presence before Veraval City Police Station on every 1st and 15th date of each month between 9.00 a.m. to 2.00 p.m.

f) not leave the local limits of State of Gujarat without the prior permission of the Sessions Judge concerned.

g) furnish the address of his residence to the I.O. and also to the Court at the time of execution of the bond and shall not change the residence without prior permission of this Court;

h) surrender his Passport, if any, to the lower court within a week;

i) not enter into the local / revenue limits of area of Vitthalvadi, Hinglajkrupa, Dabhor Road, Veraval without prior permission of this court, but for attending the Court in connection with this case will be free to enter the limits for a period to the extent necessary and will leave the limits thereafter soon the case is adjourned;

3. If breach of any of the above conditions is committed, the Sessions Judge concerned will be free to issue warrant or take appropriate action in the matter.

4. Bail before the lower Court having jurisdiction to try the case. It would be opened to the trial court concerned to give time to furnish the solvency certificate if prayed for.

5. Rule is made absolute. Direct service is permitted today.

Date : 13/6/2001 [H.K.RATHOD, J.]

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